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No. 01-1617

In The
Supreme Court of the United States

EARL ATWOOD, in his official capacity as Director, Wyoming Department of Revenue, and SLEETER DOVER, in his official capacity as Director of the Wyoming Department of Transportation,

Petitioners,

vs.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, UNION PACIFIC RAILROAD COMPANY, and the UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF OF PETITIONERS

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REPLY OF PETITIONERS

In their Petition, Petitioners have demonstrated that the criteria for granting certiorari that are set forth in Rule 10 of the Rules of this Court are met because this case raises a recurring issue of nationwide importance, the Tenth Circuit's holding is inconsistent with the decisions of this Court and other circuit courts, and there is a disagreement among courts as to whether the abrogation of Eleventh Amendment immunity in the Railroad Revitalization and Regulatory Reform Act (4-R Act) is a valid exercise of congressional power to enforce the Fourteenth Amendment. In their briefs in opposition, the Respondents make essentially two claims. Their first claim is that the *Ex Parte Young* doctrine obviates the need to resolve whether the abrogation of State sovereign immunity in the 4-R Act is a valid exercise of Congress's power to enforce the Fourteenth Amendment. Their second claim is that the 4-R Act was enacted to enforce the Fourteenth Amendment. Because both of these claims are unfounded for the reasons set forth below, the Court should grant the petition for writ of certiorari.

I. THE *EX PARTE YOUNG* DOCTRINE DOES NOT OBVIATE THE NEED TO RESOLVE WHETHER THE ABROGATION OF STATE SOVEREIGN IMMUNITY IN THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT IS A VALID EXERCISE OF CONGRESS'S POWER TO ENFORCE THE FOURTEENTH AMENDMENT

In their briefs opposing certiorari, Respondents argue that the *Ex Parte Young* doctrine provides jurisdiction over a claim against state officials brought under the Railroad Revitalization and Regulatory Reform Act (4-R Act), 49 U.S.C. § 11501. R.R. Br. In Opp. 5-9; U.S. Br. In Opp. 6, 12-14, both citing *Ex Parte Young*, 209 U.S. 123 (1908). But neither the Court of Appeals nor the District Court

decided the instant case on the basis of the *Ex Parte Young* doctrine. Moreover, States have compelling arguments that the *Ex Parte Young* doctrine is not available under the 4-R Act. If this Court does not decide the constitutionality of the 4-R Act's abrogation of Eleventh Amendment immunity, however, States will not be able to pursue these arguments because disposition of cases by courts of appeals on the grounds that the abrogation is constitutional will continue to result in the courts of appeals not reaching or deciding the *Ex Parte Young* question.

Respondents claim that the *Ex Parte Young* doctrine provides jurisdiction over a claim against State officials whenever the claim alleges an ongoing violation of federal law and seeks only prospective, injunctive relief. R.R. Br. 5-7; U.S. Br. 6, 12-14. But to interpret *Ex Parte Young* to permit a federal court-action to proceed in every such case would be to undermine the principle that the Eleventh Amendment represents a real limitation on a federal court's jurisdiction. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997). Some interests are therefore so essential to the principle of State sovereignty, that the *Ex Parte Young* exception to the Eleventh Amendment is not available in suits respecting them. *Coeur d'Alene*, 521 U.S. at 281-288.

"It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments." *Dows v. City of Chicago*, 78 U.S. 108, 110 (1870). "Taxes being the sole means by which sovereignties can maintain their existence," *Bank of Commerce v. Tennessee*, 161 U.S. 134, 146 (1896), "the power of taxing . . . is essential to the very existence of government." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819). The taxation authority of state government is therefore "central to state sovereignty". *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 345 (1994). Thus, the States' power to tax implicates interests essential to sovereignty. *ANR Pipeline Co. v. Lafaver*, 150 F.3d

1178, 1193 (10th Cir. 1998), *cert. denied*, 525 U.S. 1122 (1999); *Neinast v. Texas*, 217 F.3d 275, 282 (5th Cir. 2000).

In accordance with these principles, the very Court of Appeals in which the instant case arises, the U.S. Court of Appeals for the Tenth Circuit, has already held that the power to tax is essential to State sovereignty because it would be impossible for a State to exist without the power to tax:

> [A] state's interests in the integrity of its property tax system lies at the core of the state's sovereignty. Indeed, where it is possible to imagine a state government continuing to maintain its sovereignty despite the lack of any ownership of land, cf. *Coeur d'Alene Tribe,* 117 S.Ct. at 2041, it is impossible to imagine that a state government could continue to exist without the power to tax.

ANR Pipeline, 150 F.3d at 1193.[1]

Accordingly, that court has already ruled that a plaintiff's challenge to a State's tax code is "a major intrusion into [the State's] special sovereignty interest" and that therefore "[t]he Eleventh Amendment stands as a barrier to such a request." *ANR Pipeline*, 150 F.3d at 1194 (10th Cir.). Thus, a decision by this Court on the issue of whether the abrogation of Eleventh Amendment immunity contained in the 4-R Act is a valid exercise of Congress's power to enforce the Fourteenth Amendment cannot be dismissed as a mere academic exercise and could well prove dispositive of the instant litigation.

Respondents' claims regarding the *Ex Parte Young* doctrine are disproven by the very recent decision upon which they rely, *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 122 S.Ct. 1753, 70 U.S.L.W.

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[1] The *ANR Pipeline* case concerned a claim by utilities that federal equal protection entitled them to the benefits of the 4-R Act, rather than a claim by railroads that a particular tax against railroads violated the 4-R Act.

4432, 2002 WL 1008485 (U.S. May 20, 2002). R.R. Br. In Opp. 5-9; U.S. Br. In Opp. 12-14. In that decision, the Court noted that where Congress defines and limits the duty imposed by a statute and establishes a specific means to enforce that duty by legislating a "detailed remedial scheme," there is no jurisdiction under *Ex Parte Young*. *Verizon*, *supra*, citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). Accordingly, the Respondents' claim that the *Ex Parte Young* doctrine provides jurisdiction over a claim against State officials whenever the claim alleges an ongoing violation of federal law and seeks only prospective, injunctive relief is not correct. Moreover, *Verizon* did not overrule *Coeur D'Alene*; *Verizon* did not deal with whether the interest implicated in *Verizon*, utility ratemaking, concerned an interest essential to sovereignty. In fact, the *Verizon* decision did not even address the Eleventh Amendment's preclusion of the application of the *Ex Parte Young* doctrine to suits implicating interests essential to sovereignty.

Finally, the Railroad Respondents argue that Congress "already considered and dealt with the concept of comity" in enacting the 4-R Act and therefore intended to confer *Ex Parte Young* jurisdiction over 4-R Act claims. R.R. Br. In Opp. 8-9 citing *Burlington Northern R. Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 464 (U.S. 1987). However, the principle of comity is not coextensive with the principle of sovereign immunity. After all, Congress can overcome a comity barrier to jurisdiction by mere legislation, but cannot overcome a constitutional barrier to jurisdiction like the Eleventh Amendment. *Couer D'Alene* was premised on constitutional grounds not considered in *Oklahoma Tax Commission*, a case which predated both *Coeur D'Alene* and *Seminole*. For this reason, Respondents' constitutional avoidance argument fails. R.R. Br. In Opp. 9; *see* U.S. Br. In Opp. 14. The doctrine holding that States are immune from *Ex Parte Young* actions implicating

interests essential to sovereignty *is* constitutional; it derives from the Eleventh Amendment. *Coeur d'Alene*, 521 U.S. at 267-288.[2]

II. THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT WAS NOT ENACTED TO ENFORCE THE FOURTEENTH AMENDMENT BECAUSE CONGRESS PASSED THE ACT FOR THE VERY PURPOSE OF PROHIBITING PRECISELY WHAT THE FOURTEENTH AMENDMENT PERMITS

The Respondents contend that certiorari should be denied because the 4-R Act meets the requirements for rendering abrogation of Eleventh Amendment immunity constitutional under the Fourteenth Amendment. R.R. Br. in Opp. 11-17; U.S. Br. in Opp. 6-12. As demonstrated in the Petition, however, Congress failed to satisfy the two main predicates for valid Fourteenth Amendment legislation, *viz.*, a pattern of activity by the States that violates the Fourteenth Amendment and a remedy that is a congruent and proportionate response to that conduct. *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997). It is true, of course, that the 4-R Act prohibits States from discriminating against railroads. But this point, emphasized especially by the Railroad Respondents (Br. in Opp. 11-17), begs the question whether it was unconstitutional State conduct that the 4-R Act was

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[2] The one Court of Appeals to reach the *Ex Parte Young* issue in the context of the 4-R Act did not address the issue of whether the *Coeur D'Alene* doctrine precluded such jurisdiction. *CSX Transportation Co. v. Board of Public Works*, 138 F.3d 537 (4th Cir.), *cert. denied, sub nomine West Virginia Board of Public Works v. CSX Transportation, Inc.*, 525 U.S. 821 (1998).

designed to combat. The legislative history and the record before Congress shows it was not.

In arguing to the contrary, Respondents cite cases in which courts ruled that States had violated the Fourteenth Amendment by failing to apply their own laws equally with respect to the taxation of railroads. R.R. Br. in Opp. 15; U.S. Br. in Opp. 9. That showing is inadequate for two reasons. ***First***, the legislative history establishes that Congress passed the 4-R Act to address a distinctly different State activity, one that is subject to mere rationale basis review – States' enactment of laws that permit railroads to be treated differently, such as by separately classifying railroad property. ***Second***, the cases cited by Respondents and before Congress were utterly insufficient in number to justify, under the Fourteenth Amendment, the sweeping nationwide rule embodied in the 4-R Act.

1. The motivation underlying enactment of the 4-R Act can be seen most clearly in the Senate Report. After observing that several federal district courts had "voided discriminatory tax assessments and levies on common carrier property to the extent such practices were in conflict with applicable State laws or constitutional provisions," the Report went on to describe that the situation that necessitated congressional action was treating railroads differently than other classes of taxpayers and that such action was necessary precisely because the Fourteenth Amendment permitted such treatment:

> [T]hese decisions do not reach the situation in which State or local authorities levy discriminatory assessments or tax rates against common carriers, where the express provisions of State law or a State constitution permit such discriminatory treatment. This is most often accomplished by classifying carrier property in a separate class from other taxable property in the same district, a practice which the Supreme Court allowed in *Nashville, Chattanooga & St. Louis Railway v. Browning*, 310 U.S. 362 (1940),

> against a claim that such classification is violative of the "equal protection" clause of the 14th amendment.

S. Rep. No. 91-630 (1969) at 7.

Hence, while the Railroad Respondents (Br. in Opp. 14 n.12) are correct that the Senate Report cited *Louisville & Nashville R.R. Co. v. Public Service Commission of Tennessee*, 249 F. Supp. 894 (M.D. Tenn. 1966), *aff'd*, 389 F.2d 247 (6th Cir. 1968) (State violated Equal Protection Clause by failing to apply State's own law placing property in the same class for purposes of taxation), the Report did so when describing the specific issue it was *not* seeking to address.

Nor is there any merit to the Railroads' contention (Br. in Opp. 14) that, when the Senate Report was written in 1969, no State in the nation had a classification system. First, that assertion is flatly contradicted by the Senate Report's statement (noted above) that discriminatory tax treatment of common carriers was "most often accomplished by classifying carrier property in a separate class from other taxable property in the same district." S. Rep. 91-630, at 7 (1969). Moreover, this Court's decisions predating Congress' consideration of the 4-R Act not only prove that States had been classifying railroads differently from other taxpayers, but that doing so did not violate the Equal Protection Clause. *See, e.g.*, *Nashville, Chattanooga & St. Louis Railway v. Browning*, 310 U.S. 362, 368-69 (1940); *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 578-87 (1938); *New York & N.E.R. Co. v. Bristol*, 151 U.S. 556 (1894); *Ohio Tax Cases*, 232 U.S. 576 (1914).

When the 4-R Act is understood in this light, the Respondents' reliance (R.R. Br. in Opp. 15; U.S. Br. in Opp. 8-9) on *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), and *Allegheny Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336 (1989), can be easily rebutted. Even apart from the simple fact that the 4-R Act was originally enacted in 1976, years before either one of those decisions,

neither of them concerned the issues that prompted the enactment of the 4-R Act. *Ward* concerned whether discrimination by States between domestic and foreign corporations violates the Equal Protection Clause. 470 U.S. at 871-883. The discrimination to which the 4-R Act is addressed, however, is not between domestic and foreign corporations, but rather between railroads and non-railroads where such discrimination is permitted by State law (and hence subject to rational basis review).[3]

Similarly, *Webster County* concerned whether the Equal Protection Clause prohibits subjecting one to taxes not imposed on others of the same class. 488 U.S. at 338-346. There is no evidence, however, that taxing some members of the railroad class differently than other members of the railroad class was the concern that prompted the passage of the 4-R Act. To the contrary, the legislative history leaves no doubt that the 4-R Act was passed because the class of railroads was being taxed differently than other classes (per State law), and because such taxation was constitutional under the Equal Protection Clause. S. Rep. No. 91-630 (1969).

The Railroad Respondents also cite (Br. in Opp. 13-14 n.11) *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923), and *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20 (1907), for their claim that Congress enacted the 4-R Act to enforce the Equal Protection Clause. But not only is the legislative history barren of any reference to those two cases, they both concerned situations where a State's alleged failure to follow its own laws was claimed to have violated the Equal Protection Clause. *Sioux City Bridge Co.*, 260 U.S. at 446; *Raymond*, 207 U.S. at 37. As noted above, that was precisely the type of situation that did *not*

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[3] For the same reason, Respondents' citation to *Southern Ry. Co. v. Greene*, 216 U.S. 400 (1910), is unavailing. That case, like *Ward*, concerned discrimination by States against foreign corporations. Moreover, it does not appear that the case appears anywhere in the legislative history.

motivate enactment of the 4-R Act. Moreover, *Sioux City Bridge Co.* concerned whether treatment of a particular taxpayer violates the Equal Protection Clause, which is a different issue than whether treatment of an entire class of taxpayers violates that Clause. *Nashville*, 310 U.S. at 367-368.

2. Even were one to assume, *arguendo*, that the 4-R Act was enacted to combat the States' failure to apply their own laws equally (and thereby disadvantage railroads), the legislative history "simply fails to show that Congress did in fact identify a pattern of," *Garrett*, 531 U.S. at 368, unconstitutional State conduct. Respondents have cited merely three decisions of this Court in which discriminatory State taxation of railroads was found to be unconstitutional – all of which were decided more than 50 years prior to enactment of the 4-R Act. On top of that, Respondents add two lower court cases (*Public Service Commission of Tennessee*, *supra*, and *People v. Belt Ry. Co. of Chicago*, 226 N.E.2d 265 (Ill. 1967)). That assemblage of cases is a far cry from the predicate demanded by this Court for the enactment of valid Fourteenth Amendment legislation. *See Garrett*, 531 U.S. at 368-374; *Kimel*, 528 U.S. at 82-91.

3. Given the absence of a predicate showing a pattern of unconstitutional State conduct, the 4-R Act is grossly disproportionate "enforcement" legislation. The Railroad Respondents nevertheless insist (Br. in Opp. 16) that it would be "difficult to imagine a more tailored or limited response" to States violating the Fourteenth Amendment by discriminating against railroads in taxation. In support of this assertion, they observe (Br. in Opp. 12, 16-17) that the 4-R Act targets only States, prohibits only the portion of the tax that is discriminatory, and prohibits only a portion of practices that violate the Fourteenth Amendment.

But it does not take much imagination to tailor and limit a prohibition against States discriminating against railroads in taxation by prohibiting such discrimination

only where doing so does not redefine the right of equal protection guaranteed by the Fourteenth Amendment. Nor does it take much imagination to tailor and limit a prohibition against States discriminating against railroads in taxation where the discriminating has no rational basis and serves no legitimate purpose.

CONCLUSION

For all the reasons set forth above, the petition for writ of certiorari, and the Brief of the States of West Virginia, *et al.*, Amicus Curiae in Support of the Petition for Writ of Certiorari, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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